SIA LEE FEI A

v.

SOH KOK KONG

HIGH COURT MALAYA, KUALA LUMPUR B
YEOH WEE SIAM JC
[DIVORCE PETITION NO: S8-33-1698-09]
12 FEBRUARY 2010

FAMILY LAW: *Children - Custody - Application by petitioner wife for care, custody and control of petitioner's and respondent's children - Character and conduct of parties - Welfare of children - Presumption under s. 88(3) Law Reform (Marriage and Divorce) Act 1976, whether rebutted* C

This was an application by the petitioner wife for the care, custody and control of the petitioner's and respondent's children (an eight-year old boy and five-year old twin girls). The three children were living with the respondent and they were also being cared for by the respondent's mother and siblings at their house. The petitioner, in support of her application, advanced the following reasons, namely, that: (i) she was the appropriate and suitable custodian; (ii) she had been taking care of the children solely; (iii) she was able to provide for the children's emotional, psychological and financial means; and (iv) she was able to spend all of the children's schooling time with them. D E F

Held (dismissing the petitioner's application):

(1) In respect of (i) and (iii), on the facts, the respondent, even though he was the father, was equally able to take care and provide for the three children. In fact, the respondent had been very responsible in supporting the family with his salary. The petitioner's reasons in (ii) and (iv) were not completely true because the respondent, his mother, brother and sister also helped in taking care of the children. The petitioner frequently disappeared from home and was often away from home for nearly half of the week, without informing the respondent of her whereabouts. Moreover, she travelled frequently to China and Indonesia for work. (paras 25 & 26) G H

(2) The presumption in s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 ('Act') had been rebutted by this court's finding of facts that, at this point of time, the respondent was the more suitable parent for the good of the twins and also the I

A eldest boy (even though he was outside the ambit of s. 88(3) of the Act). The respondent was able to provide a secure and stable environment for the children. He did not travel abroad for work but was working locally. He knew how to take care of the children and had a good support system at home for the
B children *ie*, his mother, brother and sister who were used to caring for the children as well. The petitioner, however, did not seem to be too stable. She was hardly at home due to her freelance work or for her own reasons and appeared, on the facts, to rather volatile and emotional. It was true that the twin
C girls were only five years old and, strictly speaking, should be in their mother's custody. However, the paramount consideration was the three children's welfare and, for their good, it would be undesirable to disturb their life by changes of custody. The lives of the three children with the respondent seemed to be
D very stable, which was conducive to their upbringing. It was certainly better than for the children to be with the petitioner, who was absent from home most of the time, without the provision of a good support system. Based on the above, custody of the three children was granted to the respondent
E with reasonable access being given to the petitioner. This decision to grant custody to the father and not the mother was not unprecedented, and this was merely an interim order pending the outcome of the hearing of the divorce petition. *Helen Ho Quee Weo v. Lim Hui Peng* (refd); *Chong Siew Lee v.*
F *Lau Mun Chong* (refd); *Lee Soh Choo v. Tan Ket Huat* (foll). (paras 27-32)

[Order accordingly.]

Case(s) referred to:

G *B Ravandran Balan v. Maliga Mani Pillai [1995] 1 LNS 21 HC* ***(refd)***
Chong Siew Lee v. Lau Mun Chong [1994] 1 LNS 31 HC ***(refd)***
Helen Ho Quee Neo v. Lim Hui heng [1974] 1 LNS 48 HC ***(refd)***
Lee Soh Choo v. Tan Ket Huat [1986] 2 CLJ 143; [1986] CLJ (Rep) 440 HC ***(foll)***
H *Mahabir Prasad v. Pushpa Mahabir Prasad [1981] CLJ (Rep) 174 [1981] 1 CLJ (Rep) 182* ***(refd)***
Sivajothi K Suppiah v. Kunathasan Chelliah [2000] 3 CLJ 175 HC ***(refd)***
Tan Chong Pay v. Tan Swee Boon [1997] 4 CLJ 625 HC ***(refd)***
Teh Eng Kim v. Yew Peng Siong [1977] 1 LNS 138 FC ***(refd)***
W v. H [1986] 2 CLJ 350; [1986] CLJ (Rep) 763 HC ***(refd)***
I

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 88(1), (2), (3), 96

For the petitioner - Puspha Ratnam; M/s Hakem Arabi & Assoc
For the respondent - Ranjet Kaur Sandhu (Tew Min Siew with him); M/s TG Lim & Partners

Reported by Suresh Nathan

JUDGMENT

Yeoh Wee Siam JC:

[1] This is an appeal by the petitioner wife ("the petitioner") against my decision made on 26 January 2010 in respect of the *ex parte* summons in chambers ("SIC") (encl. 6) which was filed by the petitioner for the care, custody and control ("custody") of the children of the petitioner and the respondent. The SIC prayed for the following:

1. Hak jagaan, pemeliharaan dan kawalan sementara Soh Wei Ren (Tarikh Lahir: 27.08.2002) (No Sijil Kelahiran: BA 10871), Soh Wei Wei (Tarikh Lahir: 25.01.2005) (No Sijil Kelahiran: BL 43164) dan Soh Wei Wen (Tarikh Lahir: 25.01.2005) (No Sijil Kelahiran: BL 43165) diberikan kepada Pempetisyen;

2. Akses sementara kepada Responden setiap selang minggu dari hari Sabtu pukul 10 pagi sehingga hari Ahad pukul 4 petang;

3. Nafkah bulanan sebanyak RM3,500.00 dibayar oleh Responden untuk ketiga-tiga anak-anak pada kadar RM1,500 untuk anak sulong dan RM1,000.00 seorang untuk anak-anak kembar.

4. Kos dalam kausa; dan

5. Perintah lain atau relif selanjutnya yang difikirkan sesuai dan adil oleh Mahkamah yang mulia ini diberi atau dibuat.

[2] The brief grounds for the application as stated in the SIC are as follows:

1. Responden telah secara tiba-tiba memindahkan anak-anak perkahwinan ke rumah ibunya dan enggan membenarkan Pempetisyen berjumpa anak-anak tersebut.

A 2. Pempetisyen tidak berjumpa anak-anaknya selama 10 hari.

3. Responden dengan sengaja menyusahkan dan membuli Pempetisyen dan anak-anak.

4. Anak-anak tidak dihantar ke sekolah dari 02.11.2009.

B

5. Defendan juga menyusahkan anak-anak dan menyebabkan pengacauan rutin pelajaran, masa makan dan tidur mereka.

6. Pempetisyen risau akan kebajikan anak-anaknya.

C **[3]** Based on the records before me, it is clear that each party is alleging that the other party is not a fit parent to be given custody of the three children.

[4] After considering the affidavits and submissions of both parties, I made the following decision regarding the SIC (encl. 6):

D

1. Prayers 1, 2 and 3 : Dismissed.

2. Prayer 4 : Costs in the cause.

E 3. The petitioner is given interim access to the children as follows:

(i) on the second and third Saturday of each month at 2pm until Sunday at 4pm.

(ii) during Chinese New Year, on the second day at 11am until

F the fourth day at 8pm.

[5] The above decision was made by me bearing in mind that it is an interim order pending the outcome of the hearing of the divorce petition (encl. 1).

G **[6]** In support of her application, the petitioner informed the court, *inter alia*, as follows:

[7] The three children were forcefully taken away from her since November 2009. The eldest boy is eight years old and the twin girls

H are five years old.

[8] The petitioner is engaged in freelance sales work. However, she stated that she is able to spend a lot of time with the children, more than what the respondent can do since his work schedule is

I unpredictable as he does a part-time job involving the sale of food which keeps him away till the late hours. The people at the respondent's home who take care of the children are his mother, brother and sister.

[9] The petitioner contended that the children had always been with her since their births and she, as the mother, plays a pivotal role in their lives at this infant stage of their lives.

[10] On the other hand, the respondent in his reply affidavit (encl. 15) contended that, on an average, the respondent was only at home two or three days a week. Off and on, the petitioner would send the eldest child to school. After that, the petitioner would go out alone and the respondent had no idea where she went. The couple married in October 2001. Initially they lived with the respondent's mother in the Ampang home. In early 2003, about five or six months after the eldest child was born, the couple, with the child, moved to their own home in Desa Petaling. However, for Saturday and Sunday, they still go back and stay at the Ampang home. At the end of 2006, the couple with their three children moved to a new home in Taman Puchong Hartamas.

[11] After the twins were born, from January 2005 to September 2005, the respondent was jobless. The respondent contended that the petitioner directed him to take care of the three children since the petitioner was not keen to take care of them. Since the birth of the twins, the respondent slept with the twins while the petitioner slept with the eldest child. This is because the petitioner directed the respondent to take care of the twins at night, giving them milk, changing their diapers and also to do the housework. The three children are now with the respondent and they are also being taken care of by the respondent's mother and siblings at the Desa Petaling house. The respondent's mother is a housewife.

[12] According to the respondent, the petitioner's freelance work involves traveling to China, Indonesia and other countries. On the other hand, the respondent started a business running a fish stall with the help of his family. Later, because the hours were long, from 1am to 10pm, the respondent decided to go back to his former job as a Technician with Jant Marketing Sendirian Berhad in November 2007.

[13] The respondent contended that he had always been supporting the family. If at all he could not celebrate the children's birthdays in 2008 and 2009 with the petitioner, it is because he did not know where the petitioner was and she could not be found.

[14] The respondent contended that the petitioner frightened the children when she came to the house with a lorry on 30 October 2009 and forcibly moved out her personal belongings together with the children's clothes, and the washing machine of the respondent's mother. That was why the respondent moved the children to the Desa Petaling house for them to be cared for by his mother. He then decided to change the house locks to prevent future raids or trespass by the petitioner.

[15] The respondent contended that the petitioner climbed the fence and tried to snatch the three children from Taman Puchong Hartamas home on 15 November 2009. After the incident, at the end of December 2009, the respondent decided to move house to Taman Pinggiran Cheras with the three children.

[16] On 5 January 2010 the petitioner tried to take the eldest child from school. When the respondent's sister objected, the petitioner slapped her infront of everybody in the school grounds (see police report in exh. SKK12 of the respondent's affidavit). After the incident, the eldest child asked the respondent for a change of school.

[17] Section 88(1) of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") provides that the court may at any time by order place a child in the custody of his or her father or his or her mother. In *Teh Eng Kim v. Yew Peng Siong* [1977] 1 LNS 138 it was stated that no parent has a prior right.

[18] Under s. 88(2) of the Act, in deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this the court shall have regard to:

(a) the wishes of the parents of the child; and

(b) the wishes of the child, where he or she is of an age to express an independent opinion.

[19] In this case, it is clear that the petitioner and the respondent both love their children and seek to be given the custody of the children.

[20] The children, being eight years old and five years old respectively, are too young to express on independent opinion on their custody.

[21] Section 88(3) of the Act provides as follows:

> 88(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

[22] It is therefore trite law that for the good of a child below seven years of age, custody should be given to the mother unless such presumption is rebutted.

[23] Learned counsel for the petitioner was armed with numerous authorities on why the court should grant custody of the children to the petitioner, the mother (see *B. Ravandran a/l Balan v. Maliga d/o Mani Pillai* [1995] 1 LNS 21; *Teh Eng Kim v. Yew Peng Siong* [1977] 1 LNS 138, *W v. H* [1986] 2 CLJ 350; [1986] CLJ (Rep) 763, *Sivajothi K Suppiah v. Kunathasan Chelliah* [2000] 3 CLJ 175, *Tan Chong Pay v. Tan Swee Boon* [1997] 4 CLJ 625, and *Mahabir Prasad v. Mahabir Prasad* [1981] CLJ 174; [1981] CLJ (Rep) 182).

[24] In summary, learned counsel for the petitioner prayed for order in terms of the SIC (encl. 6) for the following reasons:

(a) the petitioner is the appropriate and suitable custodian.

(b) the petitioner has been taking care of the children solely.

(c) the petitioner is able to provide for the children's emotional, psychological and financial needs.

(d) the petitioner is able to spend all of the children's schooling time with them.

[25] Regarding (a) and (c) above, I am of the view that the respondent, even though he is the father, is equally able to take care of and provide for the three children. In fact, the respondent has been very responsible in supporting the family with his salary.

[26] The petitioner's reasons in (b) and (d) are not completely true because the respondent, his mother, brother and sister also help in taking care of the children. The petitioner frequently

A disappeared from the home and was often away from home for nearly half of the week, without informing the respondent of her whereabouts. Moreover she travels to China and Indonesia frequently for work.

B **[27]** I find that the rebuttable presumption in s. 88(3) of the Act has been rebutted by my findings of fact that, at this point of time, the respondent is the more suitable parent for the good of the five year old twins. What I now state here regarding my consideration of the issue on the custody of the twins is also equally applicable to C my consideration of the issue on the custody of the eight year old eldest boy even though he is outside the ambit of s. 88(3) of the Act. The respondent is able to provide a secure and stable environment for the children. He does not travel abroad for work but is working locally. He knows how to take care of the children D because he used to take care of them when they were young, especially the twins, even at night. Apart from that, he has a good support system at home for the children *ie*, his mother, brother and sister who are used to caring for the children as well. There is no evidence of the respondent being unsuitable to parent the three E young children. On the other hand, there is evidence that, at this point of time, the petitioner does not appear to be too stable. She did a lot of disappearing acts and was hardly at home due to her freelance work or for reasons of her own. By the fact that the petitioner could not be found or contacted by the respondent for the F children's birthdays in 2008 and 2009, it shows clearly that the petitioner, though she is the mother, did not make the necessary efforts to celebrate the birthdays of the three young children who are still at an age where birthdays mean a lot to them. The petitioner also appears to be rather volatile and emotional and could G even slap her sister-in-law infront of her eight year old son in school to the extent that the son asked the respondent to change his school.

[28] It is true that the twin girls are only five years old and H therefore below seven years old, and strictly speaking they should be under the custody of the mother. However, my paramount consideration is for the welfare of the three children, that, for the good of these three young ones, it would be undesirable to disturb the life of the children by changes of custody (see s. 88(2) and (3) I of the Act). Since November 2009, the children have been living with the respondent and the grandmother, aunt and uncle. In fact, the eight year old boy now goes to school, supervised by the aunt, as disclosed in the police report (exh. SKK12).

[29] The lives of the three children now, living together with the respondent, and being cared for by the respondent, the respondent's mother, sister and brother seem to be very stable, and this is conducive for the children's upbringing. It certainly is better than for the children to be with the petitioner who is absent from home most of the time, without the provision of a good support system.

[30] I have taken into account the character and conduct of the parties. Over and above that, I take into consideration the welfare of the children (see also *Helen Ho Quee Neo v. Lim Hui Heng* [1974] 1 LNS 48 and *Chong Siew Lee v. Lau Mun Chong* [1994] 1 LNS 31).

[31] Based on the above, I granted custody of the three children to the respondent with reasonable access being given to the petitioner as suggested by the respondent in his reply to the petition in paras. 44 2(a)(i) and (ii). This decision to grant custody to the father and not the mother is not unprecedented. In *Lee Soh Choo v. Tan Ket Huat* [1986] 2 CLJ 143; [1986] CLJ (Rep) 440, Siti Norma J (as she then was) dismissed the application of the applicant-wife because she could not show that she will be able to devote her full attention to the children.

[32] It must be stressed here that the order that I made is merely an interim order. At any time after this, the petitioner can always apply to the court for variation of the order under s. 96 of the Act, regarding custody and frequency of access, if there is any material change in the circumstances. In any case, the issue of custody will finally be decided at the hearing of the divorce petition.

[33] I therefore ordered accordingly.